91-770

(1)

Case No. _____

UNITED STATES SUPREME COURT

1991 Term

JOSEPH C. KIRCHDORFER, INC.

Petitioner

v.

DONALD B. RICE, SECRETARY OF THE AIR FORCE,

Respondent

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

LAURENCE J. ZIELKE
PEDLEY ROSS ZIELKE GORDINIER
1150 Starks Building
Louisville, Kentucky 40202
502-589-4600

I.

QUESTION PRESENTED FOR REVIEW

1. WHETHER DENYING ADMISSABILITY OF EXCULPATORY EVIDENCE WHICH WAS CLEARLY ADMISSIBLE UNDER FEDERAL RULES OF EVIDENCE 803(24) WAS PATENT ERROR AND DENIAL OF DUE PROCESS.

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TABLE OF AUTHORITIES

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II.

REPORTS AND OPINIONS OF THE COURTS AND ADMINISTRATIVE AGENCY BELOW

1. Petition for Rehearing and Suggestion for Rehearing En Banc to the United States court of Appeals for the Federal Circuit denied September 17, 1991.

2. The opinion appealed to the United States Court of Appeals for the Federal Circuit: SKIP KIRCHDORFER, INC., V. DONALD B. RICE, SECRETARY OF THE AIR FORCE, Case No. 91-1151, Judgment Entered without Opinion on August 6, 1991.

3. Appeal is taken from an opinion by an Administrative Judge of the Armed Services Board of Contract Appeals: SKIP KIRCHDORFER, INC. ASBCA Nos. 32637 and 35074, Opinion Dated September 13, 1990.

III.

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

Petitioners appeal from the decision of the United States Court of Appeals for the Federal Circuit entered August 6, 1991, affirming the decision rendered by the Armed Services Board of Contract Appeals, as identified above, entered September 13, 1990.

This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

IV.

APPLICABLE CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS.

1. Federal Rules of Evidence Rule 803(24)

V.

STATEMENT OF CASE

This is a case where the Air Force defaulted Kirchdorfer on a multi-million dollar contract at Eglin Air Force Base, Florida. Default for termination is capital punishment to a government contractor since it terminates all existing contract rights and exposes the defaulted contractor to reprocurement costs.

Kirchdorder was performing work for the Air Force in renovating housing units when the government refused to accept Kirchdorfer's work. The government refused to tell Kirchdorfer why it was refusing its work. Kirchdorfer retained a retired Corps of Engineers inspector by the name of Mr. Vernon Davis to assist Kirchdorfer in reviewing the work and

having the work accepted by the Air Force.

Mr. Davis went to the job, prepared reports, made inspections and gave detailed documents showing how the work complied with the specifications. Kirchdorfer's work was such that the Air Force would have no choice but to accept the workmanship of Kirchdorfer. Two months after Mr. Davis was hired and prepared his reports the Department of the Air Force terminated Kirchdorfer's contract for default.

The matter was heard before the Armed Services Board of Contract Appeals in an Administrative Hearing. During the hearing Kirchdorfer tendered as exhibits the reports of Vernon Davis under the Federal Rules of Evidence Rule 803(24), Residual Hearsay Rule. The documents were tendered under this rule since Mr. Davis

had died in 1988, which was almost two and one-half years after the contract was terminated and one year prior to the trial. The contract had been reprocured in 1987 and tne working conditions had changed at Eglin Air Force Base, making it impossible for Kirchdorfer to have any other expert critique the work as Mr. Davis had done in 1985. Kirchdorfer's only credible evidence were the reports of Vernon Davis which stated that Kirchdorfer's work complied with the specifications but the Board of Contract Appeals would not allow the evidence. The Court of Appeals for the Federal Circuit heard the case and affirmed the Board of Contract Appeals.

VI.

REASONS FOR ALLOWANCE OF THE WRIT

The Writ should be granted since the Circuits are split in their application

of the Residual Hearsay Rule as provided for by the Federal Rules of Evidence. The Federal Circuit by affirming the Board of Contract Appeals adopted a rule which is not contemplated by the Federal Rules of Evidence in considering whether to admit or to deny evidence. The Board of Contract Appeals and the Federal Circuit found that exculpatory evidence could not be admitted if the prejudice of the government is too severe. This is not a test under the Federal Rules of Evidence and no court other than the Court of Appeals for the Federal Circuit has adopted such a test.

The reports of Mr. Davis were critical, significant, material and irreplaceable and could not be replicated and were more probative than anything else Kirchdorfer had to support its case

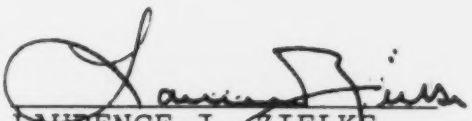
that the termination for default was improper.

Kirchdorfer was unable to prove that it was existing conditions at the Air Force Base, and the fact that the government has defective specifications without the admissability of the Vernon Davis reports. The only Court of Appeals which has addressed this issue is Dallas County v. Commercial Union Assurance Company, 286 F.2d 388 (5th Cir. 1961). The Fifth Circuit as well as Moores Federal Practice address the Residual Hearsay Rule in that the rule should be one of admissability following what is known as "a rule of necessity and reasonable efforts standard". The rule of necessity and reasonable efforts standard is such that the evidence would be admitted under the Residual Hearsay Rule when it can be shown that the

proponent made reasonable efforts to duplicate the evidence elsewhere. In this case, Kirchdorfer could not duplicate the evidence since Vernon Davis had died after the work had been completed and changed. The government put on no evidence that Kirchdorfer could duplicate the exculpatory evidence. Furthermore, the records of the government showed that due to hiring a new contractor and changing the work Kirchdorfer had no opportunity to produce new evidence showing that Kirchdorfer's work should not have been rejected.

The Court of Appeals for the Federal Circuit is a new circuit which provides for appeals for all Board of Contract Appeals cases. The Supreme Court needs to grant certiorari in this case in order to have a definitive ruling on the Residual Hearsay Rule and as to the

applicability of the Federal Rules of Evidence in these administrative hearings.



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(2)

91-770

Case No. _____

UNITED STATES SUPREME COURT

1991 Term

JOSEPH C. KIRCHDORFER, INC.

Petitioner

v.

DONALD B. RICE, SECRETARY OF THE AIR FORCE,

Respondent

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

APPENDIX
VOLUME I

LAURENCE J. ZIELKE
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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-1151

SKIP KIRCHDORFER, INC.,
Appellant,

v.

THE UNITED STATES,
Appellee.

O R D E R

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT

Dated: September 17, 1991

FRANCIS X. GINDHART, Clerk

SKIP KIRCHDORFER v. US, 91-1151

(BCA - 35074 & 32637)

Filed: US Court of Appeals for the Federal Circuit Sep 17 1991

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-1152

SKIP KIRCHDORFER, INC.,
Appellant,

v.

THE UNITED STATES,
Appellee.

O R D E R

Before LOURIE, Circuit Judge, BENNETT, Senior Circuit Judge, CLEVENGER, Circuit Judge.

A Petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on September 12, 1991.

FOR THE COURT

Dated: September 5, 1991

FRANCIS X. GINDHART, Clerk

SKIP KIRCHDORFER v. US, 91-1151

(BCA - 35074 & 32637)

Filed: US Court of Appeals for the Federal Circuit Sep 5 1991

Note: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

91-1151

SKIP KIRCHDORFER, INC.,

Appellant,

v.

DONALD B. RICE, Secretary of the Air Force,

Appellee.

JUDGMENT

On Appeal from the Board of Contract Appeals Armed Services
In Case No(s) 35074 and 32637
ORDERED and ADJUDGED:

Per Curiam: (Lourie, Circuit Judge, BENNETT, Senior Circuit Judge, and CLEVENGER, Circuit Judge):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

Dated: August 6, 1991

FRANCIS X. GINDHART, CLERK

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT
WITHOUT OPINION

JUDGMENT ENTERED: Aug 06 1991

The Judgment of the Court in your case was entered today pursuant to Rule 36. No opinion accompanied the judgment. The mandate will be issued in due course.

Costs may be recoverable under rule 39. A party entitled to costs is provided with a bill-of-costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs when taxed are payable to the party awarded its costs. If costs ae awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Costs should be paid promptly.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this Court.

FRANCIS X. GINDHARD, CLERK

SKIP KIRCHDER V. US. 91-1151
(BCA AS - 35074 & 32637)

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- ASBCA Nos. 32637 & 35074

Skip Kirchdorfer, Inc.)
)
Under Contract No. F08651-84-C-0123)

APPEARANCE(S) FOR THE APPELLANT:

LAURENCE J. ZIELKE
PEDLEY, ROSS, ZIELKE, GORDINIER
& PORTER
Louisville, Kentucky 40202

APPEARANCE(S) FOR THE GOVERNMENT:

Col. James C. Babin, USAR
Chief Trial Attorney
Mark E. Landers, Esquire
COL Richard L. Farr, USAR
Senior Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE STEMPLER

These are timely appeals from contracting officer final decisions. ASBCA No. 32637 is an appeal from the termination for default of appellant's contract. ASBCA No. 35074 is an appeal from the denial of appellant's $494,475 delay claim. ASBCA No. 35074 is before us on entitlement only. The Contract Disputes Act is applicable. A three week

trial was held at the Board starting on 13 March 1989. Both parties have filed post-trial brief.

FINDINGS OF FACT[1]

1. On 8 June 1984, the United States Air Force, Eglin air Force Base, Florida, and Skip Kirchdorfer, Inc. (SKI) entered into contract No. F08651-84-C-0123. The $2,937.704 firm fixed-priced construction contract called for SKI to perform extensive improvements on 690 family housing units in the Plew housing section on the base. The housing project was divided into three sections: area I, II and III. Performance was to commence 5 days after receipt of the notice to proceed and be completed within 540 calendar days (23 January 1986). The contract contained the following relevant special provisions and full-text clauses:

SP-10. INVOICES & PAYMENT

Submit invoices in quadruplicate to the Administrative Contracting Officer, AD/PMMA-2, Eglin Air Force Base, Florida 32542. Payment will be made by AD/ACFCS-1, Eglin Air Force Base, Florida.

Payment for work covered by these specifications will be made in accordance with General Provisions DAR 7-602.7. No payment will be made for work accomplished without prior authorization of the Contracting Officer for items specified in paragraph 8.b, page 08200-2, and paragraph 8, page 09258-2 of the Specifications.

* * *

SP-13. MATERIALS APPROVAL SUBMITTED

Within 10 days after commencement of work as otherwise established by the Contracting Officer, all material and articles requiring approval, as contemplated by the "Materials and Workmanship" clause, shall be submitted by the Contractor, by means of AF Form 3000.

SP-14. PERFORMANCE SCHEDULE

Performance period is based on the following schedule:

a. All Type 34 and Type 44 housing units in Area 1 and all Type 34, 36 and 44 housing units to have bathroom floors repaired in Area 2 will be unoccupied during performance of the contract work, but will contain Government-owned free standing kitchen ranges and

refrigerators. All other housing units will be occupied during performance of the contract work. The Contractor shall keep the kitchens and baths of all occupied housing units operational during the construction period by completing installation of the dishwashers, garbage disposals, range hoods, grease spashplates, and tub-shower enclosures the same day that work is begun on these items in a housing unit. New windows and doors shall be installed in the openings the same day the existing items are removed. New ceiling finish in housing units where ducts are required to be insulated shall be installed (excluding taping, finishing, and painting) with [sic] two (2) calendar days after existing ceiling finish is removed.

b. Work on each occupied housing unit may be done at any time during the contract period after all materials required for that housing unit are on hand and ready for use. No interior work shall be performed in a housing unit unless an adult (18 years or older) occupant of the unit is present. All interior work (dishwashers, garbage disposals, range hoods, grease splashplates, duct insulation, and all associated painting) on any one occupied housing unit shall be completed within four (4) working days after work is started on that housing unit. All work (exterior and interior) on any one occupied housing unit shall be completed within fifteen (15) calendar days after work is started on that housing unit.

c. Exterior and interior work on all unoccupied housing units will not

commence until 90 days after notice to proceed to provide time for submittal approval, and delivery of materials and to allow time for accumulation of vacant housing units. These housing units will be turned over to the Contractor according to the following schedule:

(1) Provide eight apartments (housing units) to the Contractor 90 days after notice to proceed.

(2) Provide four additional apartments 104 calendar days after notice to proceed.

(3) Thereafter, provide four additional apartments every seven calendar days.

(4) First eight apartments shall be completed within 28 calendar days after release of apartments to Contractor.

(5) Each remaining increment of four apartments shall be completed within 21 calendar days after release of apartments to Contractor.

d. The area where the contract work shall begin will be designated by the Government. Housing units will generally be made available within the same general area for accomplishment of the contract work; however, in some cases the contractor may be required to temporarily skip certain buildings due to non-availability at that time and to perform the work at a later date during the contract period. Repairing of

housing units shall be performed in a consecutive manner; proceeding randomly throughout the project site will not be allowed. The contractor shall notify the Government a minimum of seven (7) calendar days prior to starting work in each occupied housing unit.

NOTE: The day that work is started shall be included in the specified number of days allowed for completion of work specified in Paragraphs Sp-14a, b, and c above.

* * *

COMMENCEMENT, PROSECUTION AND COMPLETION OF WORK (1965 JAN) DAR 7-602.44(a)

The Contract will be required to commence work under this contract within five (5) calendar days after the date of receipt by him of notice to proceed, to prosecute said work diligently, and to complete the entire work ready for use not later than five hundred forty (54)* calendar days after receipt of notice to proceed. The time stated for completion shall include final clean-up of the premises.

*See Special Provision SP-14 of the contract.

* * *

LIQUIDATED DAMAGES (1965 JAN)-DAR 7-603.39

In case of failure on the part of the Contractor to complete the work

within the time fixed in the contract or any extensions thereof, the Contractor shall pay to the Government as liquidated damages, pursuant to the clause of this contract entitled "Termination for Default--Damages for Delay--Time Extensions," the sum of $3.50 per day for each unoccupied housing unit for each day of delay within the time stated in accordance with Special Provision No. 14; in addition $63.80 for each day of delay in completion for the total project.

(R4, tabs 4, 5)

2. The contract also incorporated by referenced the following relevant standard clauses: DAR 7-103.12(1), Disputes (1983 FEB); 7-602.3, Changes (1968 FEB); 7-602.5, Termination of Default--Damages for Delay-Time Extensions (1969 AUG); 7-602.7, Payments to Contractor (1982 DEC); 7-602.9, Material and Workmanship (1964 JUN); 7-602.10(a), Contractor Inspection System (1964 NOV); 7-602.11, Inspection and Acceptance (1976 OCT); 7-602.54(1), Shop Drawings (1976 OCT); and 7-603.48,

Progress Charts and Requirements for Overtime Work (1965 JAN) (R5, tab 5).

3. At the time of award, SKI had a housing maintenance contract on the base that was to end in November 1984. Mr. McDonald was SKI's project manager on the maintenance contract and was to be the project manager on the construction contract. Work under the maintenance contract gave SKI an opportunity to observe the condition of the units to be renovated under the instant contract. The Government extended the maintenance contract to 28 February 1985 and Mr. McDonald served as project manager for both contracts until the maintenance contract ended (tr. 1/46, 4/30-31, 5/238, 250; exh. A-113).

4. In 1981 or 1982, the Government has awarded a contract to renovate other housing on the base referred to as Wherry

housing. SKI based its bid price on the instant contract on what it believed to be the standard of workmanship acceptable under the Wherry contract. Mr. Skip Kirchdorfer[2] testified:

> Q. How about your observations of workmanship under the Wherry Contract under A-122, how did that affect your entering into contract in the Plew Contract?
>
> A. That's -- the standard of workmanship is what I based my bid price on.
>
> Q. How can workmanship affect bid price that you would make?
>
> A. Well, like on the soffit, for instance, I realize that I would not have to do any remedial work on the existing lookouts in areas like that. I knew that [sic] the matter [sic] in which the drip edge was installed. I knew what the doors would look like. Just standard of workmanship and what they considered acceptable work.

SKI originally bid on the Wherry solicitation but did not bid on the amended solicitation which resulted in the contract. Mr. Skip Kirchdorfer was

unaware of the modifications amending the contract or any waivers to the specifications granted by the government during performance. In preparing his bid for the contract in dispute, Mr. Skip Kirchdorfer observed the work done on the Wherry contract from his car (tr. 1/77-78, 106, 4/41, 314-15; exh. a-122).

5. A pre-performance conference was held on 23 July 1984. In attendance were: Mr. Herrin (government inspector), Mr. Hemmer (government technical representative and civil engineer), MSgt Karl Weise (government inspector), Mr. Day (contract administrator) and Mr. McDonald (SKI project manager). The government contends that it informed SKI at this meeting that the government was selecting, pursuant to special provision 14d, Palm Circle in Area Ii as the place where work was to commence. SKI denies

that it was so informed. Appellant presented testimony that by the time of this meeting, it had determined to begin work in Area I, but did not convey this information to the government. We find the government testimony more credible and determine that Mr. McDonald was advised by the government personnel present that the government wanted to commence at Palm Circle (R4, tab 9, SR4, tabs 2, 93 report 1; tr. 5/337-389, 9/7-8, 210).

6. A notice to proceed was issued by the government on 23 July 1984 and received by SKI on 1 August 1984 (R4, tab 8).

7. On 2 August 1984, SKI gave the government its ceramic tile submittal. On 10 August 1984, the government approved the submittal, stating that it

would make its color selections at a later date (exh. a-15).

8. On 17 September 1984, the government issued SKI a cure notice for failure to submit a progress schedule to the contracting officer pursuant to the Progress Charts and Requirements to the contracting officer pursuant to the Progress charts and Requirements for Overtime Work clause. All material submittals had not been submitted within 10 days as required by special provision (SP) 13 (r4, tab 11).

9. On 19 September 1984, Mr. McDonald called the government to discuss the cure notice. The parties also discussed the possibility that the government might want to revise the requirements for a door referred to as door number 2 and to change the status of

unoccupied units to occupied (SR4, tab 6).

10. On 19 September 1984, the government proposed to change the type of door for door no. 2 by contract modification and requested SKI's cost proposal (R4, tab 12).

11. On 20 September 1984, SKI submitted its material submittal for wood doors. The submittal contained insufficient data and was returned (tr. 9/12, 14, 19).

12. On 24 September 1984, SKI submitted its required progress schedule (R4, tab 13).

13. On 28 September 1984, the contracting officer disapproved SKI's schedule because it was not in the proper form and because it did not take into account that performance was to have

started 5 days after the notice to proceed was received (R4, tab 14).

14. On 1 October 1984, Skip Kirchdorfer discussed the door no. 2 and unoccupied to occupied changed with the government. Despite the government's prior discussions with Mr. McDonald, Skip Kirchdorfer had not been aware of the proposed changes and the government agreed to send him a copy of the government's proposal (SR4, tab 7).

15. On 3 October 1984, the government issued a show cause notice because an acceptable progress schedule had still not be submitted and all material submittals had not been made. The contracting officer reminded SKI that it was not allowed to work on occupied units until all materials for the units were on hand and ready for use and that 8 units were scheduled to be turned over

to SKI 90 days after the notice to proceed (R4 tab 15).

16. On 8 October 1984, SKI submitted a revised progress schedule and submitted its proposal for the change in the type of door no. 2. SKI requested a 60 day extension of for manufacture and delivery of the doors and no money for the change (R4, tabs 16, 17).

17. On 15 October 1984, SKI responded to the show cause notice, stating that the notice was without justification since the chart and submittals had been submitted prior to 4 October (R4, tab 18).

18. On 16 October 1984, SKI resubmitted the wood door submittal and the submittal was approved on 25 October, although the metal door louvers were disapproved (exh. A-21).

19. On 19 October 1984, SKI proposed a price increase of $25,290 to change the housing units scheduled to be unoccupied in area I and area II from unoccupied to occupied (SR4, tabs 8, 9).

20. A new progress schedule was submitted by SKI on 22 October, 1984 (SR4, tab 93 report 20).

21. On 23 October 1984, SKI proposed several changed to the soffit and gable vents so that SKI's roof supplier's warranty would not be voided, at a cost to the government of $42,385.59 (R4, tab 19).

22. On 25 October 1984, the government told SKI that the no cost portion of the door no. 2 change was acceptable but that the government did not agree that a 60 day extension was needed. The parties negotiated further over the extension, and on 21 November

1984, the government informed SKI that the government would not make the change to the contract's door requirements (SR4, tabs 10-11, 21, 22).

23. Also on 25 October 1984, the government proposed to modify the contract, making the unoccupied to occupied change. The government proposed changing SP 14 as follows:

> SP 14Aa: Delete first sentence in its entirety. In second sentence, delete "other". In third sentence, of the occupied housing units, insert "except Type 34 and Type 44 housing units in Area I and all Type 34, 36 and Type 44 housing units to have bathroom floors repaired in Area 2."
>
> SP 14b: In third sentence after "enclosures" insert "bathroom floor repairs".
>
> SP 14c: Delete in its entirety.
>
> SP 14d: Change Paragraph SP 14d to SP 14c.

(R4, tab 22).

24. On 25 October 1984, SKI notified the government that SKI had

suspended its material ordering for the doors during the parties' discussions concerning the possibility of changing door no. 2 and that a 45-day extension was necessary (R4, tab 23).

25. Bilateral modification P00001, with an effective date of 2 November 1984 was issued, implementing the unoccupied to occupied change and changing SP 14 as set forth in finding 1. The contract price was increased by $25,118.10 and the contract completion date remained 23 January 1986. The modification also contained a release by SKI for the change (R4, tab 30).

26. On 2 November 1984, Scott Kirchdorfer and Mr. McDonald requested that the government allow SKI to start work on the units on Oak Drive (102 Oak) in Area I and moving to Palm Circle. (Oak Drive is actually in Areas I and II.

SKI wanted to complete Area I before moving to Area II. The contracting officer denied this request and stated that work would begin on the Palm Circle units and a written sequence would be issued (SR4, tab 15; tr. 5/131-33).

27. The materials required for the work in the units on Palm Circle were different in some respects for the work on the units on Oak Drive (tr. 12/24-25).

28. On 8 November 1984, SKI began construction of its on-site warehouse to store materials for the contract (SR4, tab 93 report 23; tr. 11/58).

29. Also on 8 November 1984, the government agreed to SKI's soffit vent changes but only at no cost to the government. The government would not agree to SKI's gable vent changes (R4, tab 28).

30. On 9 November 1984, SKI ordered the door manufacturer to begin production of the doors for the contract stating that the government had accepted the change in door no. 2 (exh. A-41).

31. On 14 November 1984, SKI ordered some of the windows for Area I, some of which were usable for Palm Circle in Area II (exh. A-44; tr. 2/24).

32. On 14 November 1984, a government inspector, Mr. O'Gallagher, discussed the scheduling of housing with Mr. McDonald. The inspector showed Mr. Mcdonald the government's schedule of houses to be worked on (SR4, tab 93 report 29; tr. 11/59).

33. On 16 November 1984, the parties met to discuss scheduling. Scott Kirchdorfer stated that construction would commence on 7 January 1985. SKI stated, however, that it had materials

ordered for Area I on Oak Drive and not for Area II on Palm Circle and therefore wanted to start on Oak Drive. The government insisted that work would start on Palm Circle (SR4, tab 93 report 13).

34. On 16 November 1984, the government sent SKI proposed modification P0002 which would have changed the type of door no. 2 at no cost and without at time extension and contained a contractor release. SKI refused to sign the modification, requesting a 60-day extension and stating that work on the contract was being suspended until the matter of door no. 2 was resolved (R4, tab 27, 32).

35. On 19 November 1984, SKI requested that the government rescind its cure and show cause notices because work had been suspended on the contract since 21 September 1984 due to the proposed

government changes. The parties discussed the matter further and on 22 November SKI was informed that P00002 would be cancelled. On 10 December 1984, the government did cancel the proposed change in writing and directed SKI to submit the door per the contract requirements (R4, tab 31, 35).

36. On 27 November 1984, SKI's door manufacturer refused to accept SKI's door order (exh. A-43).

37. On 6 December 1984, the contracting officer wrote SKI and provided a list of the sequence of houses which the government was requiring SKI to perform pursuant to SP 14d.[3] The government ordered work to begin at 108 Palm Circle (Area II) and proceed through Area II to Area I starting at 102 Oak, then proceeding through Area I to Area III. Skip Kirchdorfer testified, on

cross examination, that when he received the letter, he did not consider the letter to be a directive, despite the fact that the letter said the work "shall begin", nor was he concerned enough about the contents of the letter to contact the contracting officer. He merely filed the letter away, intending to speak to the contracting officer about the matter the next time he visited the site.[4] On direct examination, Mr. Skip Kirchdorfer testified that he planned to tell the contracting officer that he [the contracting officer] did not have the right to direct the sequence of houses and if that he wanted to change the contract, to let him know (R4, tab 33; tr. 2/36, 4/36-37, 11/55-56).

38. On 18 December 1984, SKI finished construction of its on-site

warehouse (SR4, tab 94 report 1; tr. 11/58).

39. SKI did not perform any on-site work from 19 December 1984 to 8 January 1985 (SR4, tab 94 report 2).

40. On 20 December 1984, SKI gave the government its submittal for door no. 2 (exh. A-25).

41. On 8 January 1985, the government received SKI's first invoice, for $124,656. The parties conferred, and based on a contract completion figure of 2.65%, the invoice amount was changed to $88,783.46. This amount was paid to SKI on 14 January (R4, tab 37; tr. 13/183).

42. On or about 9 January 1985, a partial shipment of windows became the first materials to arrive on site (SR4, tab 94 report 3; tr. 11/58-59).

43. By letter dated 10 January 1985, the government made its ceramic tile color selection (exh. A-16).[5]

44. SKI did not perform any on-site work on the contract from 10 January 1985 to 22 January 1985 (SR4, tab 94 report 4-6).

45. On 11 January 1985, according to its own schedule, SKI should have been 9.5% complete. The government wrote SKI stating that the contract was only 2.65% complete and requiring SKI to respond with a plan to get back on schedule (R4, tab 36).

46. On 14 January 1985, the parties met to determine what materials were present on the job site. Other than government furnished equipment, SKI had only some windows on-site, but promised that all major items would be on-site in 3 to 4 days (SR4, tab 94 report 7).

47. On 18 January 1985, SKI submitted its door submittals with a new door supplier. On 22 January, the government approved the doors (disapproving the metal louvers) (exh. A-27).[6]

48. SKI did not perform any on-site work from 23 to 31 January 1985 (SR4, tab 94 report 8).

49. On 24 January 1985, in response to the government's 11 January letter, SKI stated that there had bee no actual construction yet because progress had been stopped since 21 September 1984 due to the proposed change to the type of door for door no. 2 and that progress should start in about 6 weeks (R4, tab 38).

50. On 1 February 1985, the government discovered that SKI had removed the windows from 208A Elm Street

(in Area I) and installed new windows without the government's permission. The government informed SKI that the installation was poor (SR4, tab 94 reports 9, 11).

51. On 7 February 1985, the government disapproved SKI's soffit vent proposed change and SKI withdrew the proposal. (R4, tab 39).

52. From 15 February 1985, to 3 March 1985, SKI did not perform any on-site work (SR4, tab 94 report 18).

53. On 4 March 1985, the parties met to discuss the construction start date. The government reminded SKI that the contract required 7 days notice before working on an occupied unit, and that the government had directed that work would begin at Palm Circle. Mr. McDonald was unable to provide a start

date until he spoke to Skip Kirchdorfer (SR4, tab 94 report 19).

54. On 7 March 1954, the government paid SKI's 4 February 1985 invoice. The invoice was for $59,404.23. After reductions for duplications of amounts already paid, the invoice was paid in the amount of $41,037.23 (R4, tab 40; exh. A-116).

55. On 13 March 1985, the government inspectors and Mr. McDonald met at SKI's warehouse to inventory the material. Mr. McDonald was unable to give the government a firm start date but thought work might commence on 18 March. Mr. McDonald was reminded of the 7 day notice requirement and that work would begin on Palm Circle. Mr. McDonald then stated that work would not begin on Palm Circle (SR4, tab 94 reports 20, 21; tr. 12/12-13).

56. On 18 March 1985, SKI reported that it did not have all of the material to start on Palm Circle and still had no firm start date (SR4, tab 94 report 23).

57. On 19 March 1985, Mr. McDonald informed the government that work would start on 26 March (SR5, tab 94 report 24).

58. Virtually the only contemporaneous records made by SKI were random, cryptic notes kept by Mr. McDonald. Mr. McDonald's notes begin 19 March 1985 and stop on 18 September 1985 (exh. A-107; tr. 6/11-14, 23-28).

59. On 21 March 1985, Mr. McDonald informed the government that the doors would not arrive before 27 March and the countertops might be on-site by 25 March (Sr4, tab 94 reports 26, 27).

60. On 25 March 1985, the government inspected SKI's warehouse to

determine what material was on-site. All of the materials for any one unit on either Palm Circle or Oak Drive were no on-site. Missing items included: roofing supplies (said to be a locally available item), doors, sinks, countertops, and kitchen cabinets (Sr4, tabs 29, 104, 95 reports 29-30; tr. 12/22-25).

61. On 25 March 1985, SKI informed the government that it would begin work at 102 Oak Drive (in Area I) on 26 March and contended that it had 20 days per house to perform its work. The contracting officer said that personally it did not matter to him where work started, but that engineering wanted the work to begin on Palm Circle and that SKI had been directed to start on Palm Circle. SKI's written reply to this repeated direction to commence on Palm Circle was to allege that the government

was refusing to make units available to SKI and that the government had breached the contract and ordered the work to stop (R4, tab 42; SR4, tabs 27, 94 reports 29-30).

62. On 28 March 1985, the parties met to discuss the contract. SKI contended that SP14 allowed SKI to start in any occupied area as long as all materials were on hand and all materials were on hand for Oak Drive. Skip Kirchdorfer stated that the government had approved stating on Oak Drive to which the contracting officer replied that SKI had been directed to start at Palm Circle a number of times and had even been provided a detailed schedule by the government (SR4, tab 28).

63. As far as the Board can determine, the reason the government was insisting on work commencing on Palm

Circle, was because a colonel who lived there had initiated an Inspector General's investigation as to why his quarters did not have a dishwasher (SR4, tab 36).

64. On 2 April 1985, the contracting officer replied to SKI's 25 March 1985 letter. He reminded SKI that it had been directed many times to begin work on Palm Circle and that these units were made available. Furthermore, the contracting officer stated, SKI had not complied with SP14 inasmuch as all the materials for work were not on hand and ready for use. Concluding that SKI had failed to perform the contract in accordance with its terms, the contracting officer issued a cure notice (R4, tabs 42, 43).

65. On 4 April 1985, SKI wrote the contracting officer, objecting to the

government's refusal to make unoccupied units available pursuant to SP14b. SKI stated that its schedule was to start work in Area I at 102 Oak and work consecutively until completed. SKI also inquired if the government was interested in negotiating a termination for the convenience of the government (R4, tab 44).

66. On 5 April, SKI wrote the government, stating that the government had no authority under SP14 to schedule the order in which housing units were to be worked on. It was SKI's contention that work could not begin on Palm Circle because all the materials were not on hand and ready for use and SKI had given notice on 19 March that work would commence on 26 March at 102 Oak (R4, tab 45).

67. On 18 April 1985, the contracting officer issued a show cause letter stating that SKI's response to the cure notice was inadequate in light of the government's directions to commence work on Palm Circle. The contracting officer expressed doubt as to whether SKI intended to perform the contract and demanded concrete evidence of an intention to perform. In light of the contracting officer's doubt as to SKI's intentions, he suspended material payments pending satisfactory proof of SKI's intent to begin work at Palm Circle (R4, tab 46).

68. On 25 April 1985, SKI responded to the show cause letter and alleged that the parties had previously agreed that work would begin in unoccupied units in Area I and that the area to start work had not been changed by modification

P00001, only whether the units would be occupied or unoccupied was changed. SKI alleged that the government's refusal to allow SKI to begin work on Oak Drive was stop work order and had created delay costs and the suspension of material payments was a breach of contract. SKI concluded that if the government reinstated material payments, work could commence at Palm Circle within 90 days (R4, tab 47).

69. On 9 May 1985, the contracting officer notified SKI that its response to the show cause letter was inadequate and the contract was being forwarded to a Termination Contracting Officer (TCO) for evaluation (R5, tab 48).

70. On 29 May 1985, SKI notified the TCO that it had invested all of its available resources on the contract. SKI also informed the TCO of it

interpretation of SP14 that would allow SKI to work at anytime on unoccupied units (R4, tab 55).

71. On 5 June 1985, SKI sent the TCO a $14,744.80 invoice allegedly for material which had been ordered and could not be cancelled. SKI requested that it be allowed to start work and alleged that it was never the government's intention that SKI be allowed to perform the contract (R4, tap 56).

72. On 6 June 1985, SKI notified the contracting officer that it had begun work on 108 Palm Circle. SKI was reminded that the unit was occupied and that the contract required all of the material to be on hand and ready for use, and work could not start until the 7 day notice requirement had been met. Therefore, the contracting officer

stopped SKI's work (SR4, tabs 33, 57, 95 reports 12-14).

73. Also on 6 June, a meeting was held to determine if SKI had the necessary materials on hand to perform the work. Mr. McDonald stated that he had the necessary material on hand but changed that statement, admitted that SKI did not have the roofing material, fill dirt, or cement and gravel. The government inventoried SKI's material and found other items not on hand and ready for use (SR4, tabs 34, 95 reports 12-14).

74. On 7 June 1985, the parties met and SKI was directed not to start work until all the materials for 108 Palm Circle were on hand and ready for use and that work could not commence until the seventh day following SKI's notice that

it was ready to start work on a unit (SR4, tab 35).

75. On 10 June 1985, the government gains inventoried SKI's materials. Some of the roofing material had arrived, but the windows for the Palm Circle units were not present and had not even been ordered until the prior week (Sr4, tab 95 report 17).

76. On 13 June 1985, SKI began work on 108 Palm Circle. Mr. McDonald told the inspectors that the windows for the Palm Circle units were in inventory. A check of SKI's inventory revealed that they were not. The contracting officer then stopped SKI's work and Mr. McDonald agreed to notify the government when all the materials were on hand and ready for use (R4, tab 58; SR4, tabs 40, 95 reports 20-22).

77. Although it is SKI's allegation that it did not have sufficient funds available to purchase the Palm Circle material because it had already purchased the Oak Drive material, Mr. Skip Kirchdorfer testified that SKI never attempted to compute how much the Palm Circle material would cost. SKI also did not present any financial statements that show that it was financially unable to purchase the Palm Circle material at any time. Mr. Skip Kirchdorfer testified that he did not know what SKI's financial status was at that time but the additional material purchase would have presented a severe cash flow problem. Based on this, we are unable to find that SKI was financial unable to purchase the Palm Circle materials at any time during performance of the contract (tr. 4/86-87, 122-26.

EDITOR'S NOTE

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91-770

Case No. _____

UNITED STATES SUPREME COURT

1991 Term

JOSEPH C. KIRCHDORFER, INC.

Petitioner

v.

DONALD B. RICE, SECRETARY OF THE AIR FORCE,

Respondent

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

APPENDIX
VOLUME II

LAURENCE J. ZIELKE
PEDLEY ROSS ZIELKE GORDINIER
1150 Starks Building
Louisville, Kentucky 40202
502-589-4600

78. On 24 June 1985, the windows and roofing material for the Palm Circle units arrived on the site (tr. 12/26-27).

79. On 24 June 1985, the parties met to discuss scheduling of work. The government stated that work could not begin in area I because the government intended to put the occupants in temporary housing during construction but the temporary housing would not be available until 1 October. A new work sequence was worked out, starting with Area II, then proceeding to Area III and finishing with area I. SKI was directed to perform the outside work on any given unit in which the occupant was not at home and come back to finish the inside work later. SKI represented it was prepared to begin work anywhere the government would allow. SKI repeated

that the prior actions of the government would be the subject of a claim by SKI (R4, tab 60;SR4, tab 88)..

80. On 27 June 1985, SKI returned proposed modification P00005 to the government, unsigned. The modification proposed a new sequence of work, a 120 day time extension and a release by SKI (exh. A-63).

81. On 28 June 1985, the TCO returned the contract to the TCO without terminating the contract since SKI now had the material on hand and ready for use to perform on Palm Circle (exh. A-62).

81. On 28 June 1985, the parties met to discuss the start of contract work. It was agreed that work would commence on 1 July at 102 Palm Circle. SKI was given permission to perform the outside work and return for the inside

work in instances when occupants were not at home (SR4, tab 45).

83. Work commenced as agreed on 1 July 1985 at 102 Palm Circle and SKI beginning work on the plywood enclosure of the carport (R4, tab 64, SR4, tab 96 report 2).

84. On 9 July 1985, the government paid SKI's 5 April and 9 May invoices for $158,163,49 and $45,421.39, respectively, (total of $203,584.88 (R4, tab 62).

85. On 11 July 1985, SKI requested that it be allowed to start work on another unit the next day despite the fact that it did not have the roofing material on hand to complete the job, contending that the requirement for all material to be on hand and ready of ruse was waived at the 28 June meeting. The government agreed to allow SKI to start if the materials were on hand or readily

available locally in lieu of on hand and ready for us (SR4, tab 46).

86. On 15 July 1985, a government inspector discovered a roofing company, other than the roofing subcontractor identified by SKI to the government, working on the contract. When questioned, Mr. McDonald stated that he did not know why this happened (SR4, tab 96 report 14).

87. On 16 July 1985, the government sent another proposed modification P00005 to SKI for signature. The modification formalized the schedule of work: starting in area Ii at Palm Circle, proceeding to area III and ending with area I. The modification also contained a release clause (R4, tab 63).

88. On 18 July 1985, SKI was informed that its roofing subcontractor's

insurance certificate was not adequate (SR4, tab 47).

89. On 19 July the parties met again and Mr. McDonald alleged that during the 28 June meeting, the government had waived the 15 day completion requirement. The contracting officer denied this. SKI was reminded that the government was not responsible for quality control and that it would inspect only when a unit was completed. The government inquired when SKI would have a unit completed and Mr. McDonald replied that the range hoods had to be sent back to the manufacturer and that a unit would be ready in 14 days (SR4, tab 47).

90. On 22 July 1985, SKI informed the government that it had changed roofing subcontractors.[7] (SR4, tab 96 report 21).

91. Also on 22 July, the government notified SKI that since SKI started work on 102 Palm on 1 July, and more than 15 calendar days has passed, it was delinquent (R4, tab 64).

92. On 30 July 1985, the government's construction manager (St. Stipo), project engineer, and inspector visited the 4 units on Palm Circle and 38 units on Oak Drive that SKI was working on. Work had started more than 15 days ago on 15 of these units. Some of the units had very little work accomplished and none had their new patio slabs poured. The government discovered that SKI was again beginning work on units without having all of the materials available to complete the job. In particular, after starting work on 28 units, SKI discovered that the shower

doors it had were the wrong size and could not be used (SR4, tab 51).

93. On 1 August 1985, a meeting was held at SKI's request to discuss the possibility of phasing the construction. It was SKI's position that when the government changed the sequence of houses, it waived the 15-day completion requirement. The contracting office denied that the requirement had been waived. Mr. Skip Kirchdorfer suggested that the roofers be allowed to proceed ahead of all work. The patios would then be completed and then the inside work would be performed (SR4, tab 49).

94. The government had an internal meeting on 2 August 1985 to discuss SKI's requests. SKI now had 48 units under renovation, many of which the government considered overdue. The contracting officer determined that SKI would not be

issued any more units to start work on until it began completing units (SR5, tab 50).

95. Also on 2 August 1985, the contracting officer issued SKI a cure notice for the units that the government considered overdue. The government determined the following information:

ADDRESS	DATE BEGUN	SCHEDULED COMPLETION DATE
102 Palm	1 July	16 July
104	3 July	18 July
108	9 July	23 July
110A Oak	11 July	29 July
110B	11 July	25 July
110C	11 July	25 July
110D	11 July	25 July
112A	11 July	25 July
112B	11 July	25 July
112C	11 July	25 July
112D	11 July	25 July
114A	12 July	27 July
114B	12 July	27 July
114C	12 July	27 July
114D	12 July	27 July
116A	15 July	29 July
116B	15 July	29 July
116C	15 July	29 July
116D	15 July	29 July

The government conceded that SKI had been delayed in getting into 110A Oak for

4 days. It is SKI's position that the cure notice was impossible to comply with because the 15-day period had already passed and no new completion date had been set (app. br. at 58-59). Mr. Skip Kirchdorfer testified that it was SKI's plan for July to roof all 46 units, come back and do the interior work and remaining exterior work, including windows and doors and facia and then install patios. It was also Mr. Skip Kirchdorfer's intent not to ask for an acceptance inspection for any of the units on the contract until SKI had completed allow work under the contract. He interpreted the 15-day completion requirement to mean substantial completion only (tr 1/46, 2/210, 3/26-27; R4, tab 66).

96. On 5 August 1985, SKI returned proposed modification P00005 (of 16 July

1985) to the government unsigned, objecting to the entire modification, including the sequence agreed to at the 24 June 1985 meeting (R4, tab 67).

97. On 5 August 1985, SKI informed the government that it could not supply a completion date for the Palm Circle units because of fences in the rear of the units not having been removed for patio work. SKI also replied to the cure notice. SKI stated that it was delayed by fences not having been removed or occupants not being at home at 104 Palm Circle, 106 Palm. 110A Oak, 110B Oak, 110C Oak, 110D Oak, 112A Oak, 112B Oak, 112C Oak, 112D Oak, 114A Oak, 114B Oak, 114D Oak, 116B Oak, 116C Oak, 116D Oak, 118 Oak, 120 Oak and 122 Oak.[8] SKI finished with "[i]t is unfortunate that the government cannot abide by its agreements and must resort to deceit and

entrapment to satisfy its need for personal revenge" (R4, tabs 68, 70).

98. On 7 August 1985, the government sent SKI a delinquent performance letter because 48 units were in its possession but none were completed (R4, tab 72).

99. On 8 August 1985, SKI informed the government that it could not submit a realistic progress chart because of the continuing government delays (R4, tab 73).

100. On 9 August 1985, Mr. McDonald complained to the government inspector that the occupants were slow in getting their possessions out of the work areas and asked who was responsible for notifying the residents that work was going to start. The inspector reminded Mr. McDonald that SKI had requested that it be allowed to notify the residents to

allow SKI to schedule its workforce better. On a number of occasions, SKI would make an appointment with a housing resident to perform work and not show up for the appointment. SKI would also show up to perform work without notifying the resident (SR4, tab 96, report 25, SR4, tab 97 reports 6, 15, 30-31, SR4, tab 98 reports 2, 26).

101. On 12 August 1985, Mr. Skip Kirchdorfer contacted the government, alleging that the government's 7 August deficiency letter was a stop work order. The government responded that it was not a stop work order but that no more new units would be given to SKI until it started to complete units it was working on. Mr. Skip Kirchdorfer stated that SKI considered it a stop work order and would leave the job site. The government stated that it would consider that to be

an abandonment of the contract (SR4, tab 52).

102. Also on 12 August, Mr. McDonald requested a final inspection for some of the units on Palm Circle and Oak Drive. The contracting officer instructed the inspectors to perform aa final inspection only if the units were ready to be inspected (SR4, tab 53).

103. Accordingly, on 12 August, the government performed a pre-final inspection on 102 Palm. Almost 60 punchlist items were found, discussed with SKI and reported in writing to SKI. The government expressed concern over the large number of deficiencies and questioned whether SKI had an effective quality control program. SKI agreed to put into writing any disagreements it had with any of the punchlist items found

(SR4, tabs 54, 56, 97; R4, tab 74; tr. 11/93-102).

104. Still on 12 August, Mr. McDonald also requested final inspections for 104 and 108 Palm and 112A-D Oak for 13 August. The inspectors observed that the same deficiencies were present in these units so SKI's request for an inspection was denied. (tr. 11/106-07).

105. On 13 August 1985, the government assured SKI that the residents would take down their fences as work on their units was scheduled (SR4, tab 96 report 31).

106. On 13 August 1985, SKI requested a second pre-final inspection on 104 and 108 Palm and 112A-D Oak to occur on 14 August. The inspectors performed a preliminary review of the units and most of the deficiencies remained from the prior day and therefore

the request for an inspection was denied. The inspectors again reminded Mr. McDonald that quality control was SKI's responsibility (SR4, tab 97 report 9).

107. On 14 August 1985, the inspectors performed another pre-final inspection on 104 and 108 Palm and 112A-D Oak. The same deficiencies were discovered and again SKI was reminded that the government was not going to perform SKI's quality control for it and a copy of the punchlist was hand delivered to SKI. Mr. McDonald complained that he was spread too thin and did not have the capability of performing quality control (SR4, tab 97 report 10; tr. 13/185, 200-02).

108. On 21 August 1985, at SKI's request, a reinspection of 102 Palm was performed. Twenty-eight discrepancies remained from the prior inspection and 4

additional ones were discovered. During the inspection, Mr. McDonald was told about the defects that were found (SR4, tab 97 report 17, SR4, tab 120; tr. 6/169-72).

109. On 22 August 1984, at SKI's request, a pre-final inspection was performed at 104 Palm Circle. A large number of deficiencies, some major, some minor, were discovered. Many duplicated defects found in 102 Palm Circle. Mr. McDonald stated that corrections would not be made because SKI's workmanship was at the highest level that it could attain (SR4, tab 97 report 18, SR4, tabs 59, 60; tr. 6/193-99, 8/326, 11/115-16).

110. On 23 August 1985, SKI invoiced the Government for $169677.11 based on its estimated 9% contract completion (R4, tab 80).

111. On 23 August 1985, at SKI's request, a pre-final inspection was performed at 110A-D Oak. Many of the same deficiencies were found and Mr. McDonald repeated that SKI did not intend to correct the alleged defects. SKI was directed to address in writing those defects that it was refusing to correct (SR4, tab 97 report 19, SR4, tab 122; tr. 11/207-09, 13/215-16; R4, tab 78).

112. On 4 September 1985, a pre-final inspection of 114D Oak was conducted. After finding a large number of deficiencies and determining that the unit was not ready for an inspection, SKI was advised that it must perform quality control inspections before requesting that the government inspect further. Mr. McDonald repeated that SKI did not intend to correct some of the deficiencies since SKI disagreed that they were deficiencies

(SR4, tab 97 reports 30-31; tr. 11/209-10, 13/83-84).

113. On 9 September 1985, another pre-final inspection was performed on 110A-D Oak. Numerous deficiencies were found and Mr. McDonald repeated that the defects would continue because SKI's workmanship could not get any better (SR4, tabs 61, 98 report 5; tr. 6/226-30, 11/142, 149; R4, tab 82).

114. On 10 September 1985, the government cancelled a planned inspection of 112 and 114 Oak due to obvious defects rendering the units not ready for inspection (SR4, tab 98 report 6).

115. Also on 10 September, the government refused to pay SKI's 23 August invoice until SKI completed the 48 units in its possession (R4, tab 80).

116. On 11 September 1985, Mr. McDonald asked the government for

inspections of 112A-D, 114A-D, 116A-D, 118A-d, 120A-D, 122A0D, 124A0D, 105A-D, 107A-D, 109A-D and 126B Oak. The inspectors refused to inspect because some of the buildings were not even 50% complete and an inspection would be futile (SR4, tab 98 report 8).

117. On 12 September 1985, government contract representatives went to the site to investigate. The first unit view was 105 Oak. None of the exterior work had been done at all. 109 Oak had no windows and the exterior painting was not done. Other units had interior painting undone, roofs not on, kitchen counters and patios missing (SR4, tab 62).

118. On 13 September 1985, SKI wrote the government stating:

> We have every intention of completing the units in our

possession in accordance with the contract.

Your refusal to pay until the units are accepted by the inspectors and the inspectors refusal to inspect the units is a breach of our contract and is placing a severe financial strain on our company.

We are currently demobilizing due to your stop work order and remobilization cost will compound the financial strain on our company.

(R4, tab 81).

119. On 17-18 September, 1985, pre-final inspections were conducted at 112A-D and 114A-D Oak. Numerous defects were again found (SR4, tab 98 reports 13-14; tr 11/143-44; R4, tab 92).

120. On 17 September 1984, the contracting officer issued a cure notice to SKI giving SKI 10 days to inform the government what steps it was taking to ensure that adequate quality control and correction of defects were accomplished and what efforts to diligently prosecute

the work in a timely manner SKI was making. The contracting officer also sent SKI a show cause notice that same day because the contracting officer deemed SKI's 6 August 1985 response to the contracting officer's 2 August 1985 cure notice to be inadequate (R4, tabs 84, 90).

121. On 18 September, the government project manager informed SKI's project manager that until SKI took care of the deficiencies in (a) patio expansion joints (b) shade cords, (c) soffit plywood joints, (d) screws in door lites, (e) [unintelligible writing], and (f) roof edge metal, that the inspectors would not inspect any more units (exh. A-107, note dated 18 September 1985).

122. Subsequent to 18 September 1985, SKI did not request any more

inspections from the government (tr. 11/153-54, 14/281-82, 285).

123. The record reveals that subsequent to 18 September 1985, virtually no work at all was performed on the contract and SKI had in fact demobilized. The few SKI employees left spent some of their time playing cards and golf. When on sporadic occasions the government inspectors would encounter SKI personnel on the job site apparently doing some touch-up work, the employees would immediately leave, telling the inspectors that they were only "looking around" (SR4, tab 98 reports 18 et seq., SR4, tab 99 report 2, 30-31, SR4, tabs 100-01; tr. 10/165, 169-70, 11/218-19, 13/90-91, 234-35).

124. On 19 September 1985, Mr. McDonald informed the government that SKI was going to remove its warehouse and

wanted the government to direct him as to what to do with the materials (SR4, tab 98 report 15).

125. On 19 September 1985, SKI wrote the government four letters. The first was in response to the government 10 September letter which refused to pay SKI's latest invoice. SKI stated:

> We have searched our contract and cannot locate the provision which will allow you to return our invoices without payment. I suspect that this is another attempt to penalize Skip Kirchdorfer, inc., because your previous termination for default failed.
>
> Would you please send me a coy of the "Demonstrate Your Intention" Clause of our contract on which you undoubtedly based your decision.

(R4, tab 85).

126. SKI's second 19 September 19855, retransmitted its 12 August invoice (R4, tab 86).

127. SKI's third 19 September letter was a response to the government's cure

notice. SKI stated that its quality control was adequate. SKI alleged that progress was slow due to government delays and that SKI was willing to correct all legitimate defects (R4, tab 88).

128. SKI's further 19 September letter responded to the government's show cause notice. SKI stated that all work on the units listed in the government 2 August letter had been completed, as had all punchlist items for 110, 112 and 114 Oak. SKI alleged that it had not been able to correct the defects on Palm Circle because it had not been allowed to re-enter the units (R4, tab 89).

129. As of 20 September 1985, SKI had laid off all of its workforce except four supervisors (SR4, tab 71, 98 report 16; tr. 11/123-24, 151, 12-231-32, 14-251).

130. On 24 September 1985, the parties met. SKI insisted on being paid regardless of whether the work performed was acceptable and the government contended it was entitled to withhold payment based on SKI's lack of progress. The government did agree to re-inspect the units to determine if SKI's percentage of completion had advanced (SR4, tab 65).

131. On 24 September 1985, SKI removed material from the work site to its warehouse (SR4, tab 98 report 19; tr. 11/216-17).

132. On 25-26 September 1985, the government inspectors re-inspected the units on Palm Circle and Oak for payment purposes. They determined the contract to be 5.49% complete as opposed to the 9% that SKI used to invoice on. Considering this, and the materials on site, SKI was

then paid $72,013.17 on 27 September (R4, tab 95; SR4, tab 98 reports 220-21; tr. 13/183-84).

133. On 2 October 1985, SKI wrote the contracting officer, setting out its position on the categories of defects begin reported on the punchlists and alleging that it was being held to unreasonable standards in the inspections. SKI alleged that the government had breached the contract by non-payment and that further performance was impossible until the government directed SKI as to how to correct the defects (R4, tab 96).

134. On 3 October 1985, SKI invoiced the government for $198,517.88 (R4, tab 97).

135. On 21 October 1985, the contract administrator requested the inspectors to list all the unacceptable

or incomplete work on the units that had not received a formal inspection. Most of the defects present in the Oak Drive units that had been previously inspected were also represent in the units that were now inspected (SR4, tab 99 report 11; tr. 11/155-56).

136. On 24 October 1985, the contracting officer responded to SKI's 2 October letter, denying any unreasonable inspections and pointing out that of the 48 units in SKI's possession, SKI had requested inspections on only 15 units and none had been accepted (R4, tab 98).

137. On 30 October 1985, SKI removed its backhoe, which was used to dig the foundations for the patios, from the project (SR4, tab 99 report 19; tr. 11/216-17).

138. On 31 October 1985, SKI was notified that the contract had referred

to TCO for consideration of default. SKI was directed to present any facts it had as to why the contract should not be terminated for default to the TCO (R4, tab 100).

139. On 8 November 1985, SKI presented its position to the TCO. SKI stated that all 48 of the units in its possession were complete with the exception of a "few areas that were not made accessible". SKI alleged that it had requested inspections for these units that were ready but the inspection requests were ignored. SKI's position was that the contract was impossible of performance because the government would not tell it how to correct the alleged defects. SKI stated that it would correct any items of work, if the items can be corrected and are made known to them and that SKI had personnel available

to accomplish this. SKI did not provide the TCo with any documents supporting any of its statements (R4, tab 101).

140. Contrary to SKI's assertions to the TCo that all of the 48 units were virtually complete, on 5 of the 48 units, SKI had not even started interior work (tr 11/218).

141. On 26 November 1985, the government paid SKI $63,071.74 on SKI's 3 October 1985 invoice, representing payment for materials (the windows that were delivered to the site). This was the last progress payment request received and the last payment made on the contract (exh. A-121; tr. 13/144-45).

142. In November 1985, the TCO asked the government project manager to list the deficiencies for the 14 units given pre-final inspections that SKI had been directed to correct and had not been

corrected. The inspectors, using the punchlists generated during the original inspections, re-inspected each of these units and determined that most of the discrepancies remained (SR4, tab 71; tr. 6/259-61, 8/298-302, 9/236-41, 10/117-19, 11/156-61, 13/239).

143. On 23 December 1985, by modification P0005, the TCO terminated the contract for default (R4, tab 102).

144. On 13 January 1986, the inspectors inventoried the materials at SKI's warehouse (SR4, tab 101 report 13).

145. By letters dated 14 October and 30 December 1986, SKI filed a certified claim for "additional costs due to delays during the periods 1 November 1984 thru 1 July 1985 and 7 August 1985 thru 30 December 1985," comprised in large part of unabsorbed overhead (exh. A-109-110).

146. On 20 March 1986, SKI filed a timely appeal of the TCO's decision terminating the contract for default (ASBCA No. 32637 (R4, tab 103).

147. On 2 June 1987, the contracting officer denied SKI's delay claim, contending that the 388 days of delay that formed the basis of the claim were delays due to SKI's own actions (exh. B-1).

148. On 8 June 1987, SKI filed a timely appeal of the denial of its claim (ASBCA no. 35074).

DISCRETE PROBLEMS[9]

149. We set forth below facts related to what appear to be the major disputes of consequence between the parties regarding the work performed.

EXPANSION JOINT SEALER[10]

150. Section 03300 of the specifications provides:

10. JOINTS:

a. Expansion Joints. Expansion joints shall be provided at locations indicated. Continuous preformed expansion joint filler strips, 3/8 inch thick and the full depth of slab, shall be provided in expansion joints unless otherwise indicated or specified. Edges of concrete along joints where exposed to view shall be slightly rounded. At joints between exterior slabs and building walls, the preformed filler strips shall be kept 3/4 inch below the surface and the remaining space filled neatly with an approved joint sealer. Joints shall be clean and dry before sealing compound is put in place.

151. At 102 Palm, the government engineer told Mr. McDonald not to use a joint sealer because of the peculiar arrangement of that patio. Thereafter, SKI never installed any sealer on any patio joint in the entire contract (tr. 7/168-69, 12/16, 13/221-24).

152. The lack of sealant on patio joints requiring sealant was the subject of many of the deficiencies on the

various punchlists (tr. 9/49-51; R4, tabs 78, 82, 92).

153. Despite the fact that the specifications required SKI to submit a joint sealer of the government's approval, none was ever submitted (R4, tab 5; tr. 11/190-91, 13/97-98, 13/222-24).

SOFFITS AND CARPORT CEILINGS

154. Section 06220 of the specifications states:

> 6. INSTALLATION OF EXTERIOR FINISH WOODWORK
>
> a. General. Erect exterior finish woodwork as shown. Fasten woodwork with galvanized finish or basing nails suitable for setting. Provide blind nailing as far as practicable. Set fact nails for putty stopping. All work shall be straight, level and free from sagging or warping.
>
> * * *
>
> c. Porch Ceiling and Eave Soffit Finish. Porch ceilings and eave soffits shall be

> covered with 3/8 inch thick exterior grade A-C plywood. Solid bearing shall e provided at joints, ends and edges of plywood. Plywood shall be secured with galvanized 6-penny casing nails, spaced 10 inches apart along intermediate supports and 5 inches apart along all edges. A bed mold shall be installed at walls and beams adjoining porch ceilings and soffits. Openings shall be provided in soffits for installation of prefabricated metal soffit vents specified in Section 05010, "Miscellaneous Metal Work".

(R4, tab 5).

155. During the inspection of 102 Palm on 12 August 1985, the government noticed that some of the soffits were loose and sagging. The government attributed this to improper nailing. (tr. 11/77).

156. On many occasions, and in front of many witnesses, Government personnel were able to place their hands on plywood ceilings and soffits installed by SKI and

push the boards upward, making the edges of the joints even, demonstrating that they were loose and sagging. Warped, loose and sagging soffits and facia appeared on the punchlist for many of the units.

SKI contends that the warped, loose and sagging soffits and ceilings did not exist but if they did, they were caused by curved and bowing existing structures. Appellant's expert opined this theory but testified that he did not observe the condition (of this existing structures) in examining the buildings under SKI's contract.[11] The Board was not provided with any credible evidence that this was the cause of the problem (tr. 6/148-49, 7/85-86, 10/116, 11/81-81, R4, tabs 74, 78, 92; SR4, tab 120).

SHINGLE ROOFING

157. Section 07311 of the specifications states:

> 6. APPLICATION OF STRIP-SHINGLE ROOFING;
>
> . . . Starter strips shall project a full 1/2" beyond the metal drip edge . . . . the first course of shingles shall be laid directly on top of the starter strip, flush with the outer edge and shall be aligned vertically and horizontally . . . Upon completion, any roofing showing cement or other soiling on exposed surfaces shall be removed and replaced with new roofing.

(R4, tab 5)

158. During the inspection of 102 Palm, the government noted that the 1/2" requirement for projection from the metal drip edge had not been met and that the roofing shingles on the gable end of the roof had been chopped off giving a ragged appearance. These defects appeared on the punchlists for a number of units. (tr. 11/67-68; R4, tabs 74, 78, 82).

DRIP EDGE

159. Section 07600 of the specifications states:

5. INSTALLATION

f. Metal Drip Edges. New metal drip edges formed of 26 gage galvanized iron or steel shall be provided at all edges of new strip-shingle roofing. Joints shall be lapped not less than 2" and filled with roofing cement. The inner flanges shall be extended onto the roof not less than 2" and shall be ailed 3" on center through the roofing flat. Nails shall then be covered with plastic asphalt cement. The outer flange shall be turned down over the edge of the roof to form as shown on the drawings.

(R4, tab 5).

160. During the inspection of 102 Palm, the government noted that the lap joints required on the edge metal were not 2", or in some cases did not exist at all. These defects were noted on the punchlists for many of the units as well as a "kickout" feature. A "kickout: is when the bottom vertical side of the edge metal that descends parallel to the

facia, stricks out and is not close to the facia (tr. 11/64-65; R4, tabs 74, 78, 82, 92; SR4, tab 120).

161. SKI contends that the fabrication of the drip edge in accordance with government specifications that have been adjoining strip overlapping each other, necessarily causes a "kickout" (i.e., an area where the edge sticks out from the facia). SKI contends that it was impossible to correct this problem without a redesign of the edge metal. The reprocurement contractor corrected the "kick-out" problem by renailing or crimping the metal edge joints (tr. 3/113, 10/113-15).[12]

DOORS

162. Section 08200 of the specifications states:

3. GENERAL REQUIREMENTS:

a. General Marking and Grading. Grade mark each door by stamp, brand or label of design and wording as required by the applicable NWMA Standard of FHDA Standard. Millwork for door frames shall be graded in accordance with the rules of the association governing species used. Use only recognized marks.

4. EXTERIOR DOORS:

a. General. Exterior doors shall conform to applicable requirements of NMWA Standard I.S. 1 or I.S. 5, or FHDA/7-79, and shall be toxic preservative treated.

163. Section 05010-2 of the specifications states:

8. Door Louvers: Door louvers shall be factory-fabricated extruded anodized aluminum of size and indicted on the drawings . . . A continuous bead of butyl rubber and elastomeric type sealing compound shall be applied between door and exterior flanges of door louvers to seal the join watertight.

(R4, tab 5).

164. On 16 January 1985, SKI submitted its material submittal (no. 44) for the wood doors. SKI did not supply any certification that the doors met the

standards in the specifications. The doors did not have any stamp on them indicating that they met the requirements of the specifications (exh. A-27; tr. 9/23-25; R4, tabs 78, 82, 92).

165. Throughout the contract, the Government constantly notified SKI that the wooden doors installed by SKI were "photographing." Photographing is a term common to the industry to describe a door when the outline of the blocks that make up the core of the door (under the veneer) are visible after the door has been painted. The Government felt that if the doors were built to the standards of the specifications that they should not be photographing. Since the Government had not received a door certification, nor did the doors have a stamp on them indicating that they met the standards referenced by the

(4)

91-770

Case No. _____

UNITED STATES SUPREME COURT

1991 Term

JOSEPH C. KIRCHDORFER, INC.

Petitioner

v.

DONALD B. RICE, SECRETARY OF THE AIR FORCE,

Respondent

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

APPENDIX
VOLUME III

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specifications, one of the Government inspectors called the National Woodwork Manufacturers Association (NWMA). The inspector discovered that SKI's door supplier was not certified to build doors to the standards required by the specifications. SKI never supplied any certification for the doors.[13] (SR4, tab 98 reports 2-3; tr. 9/23-27, 193, 202-03, 11/211-13, 222-24).

166. Throughout the contract, the parties disputed whether the door louvers had been sealed with caulk at the factory. The lack of caulk on door louvers appeared on the punchlists for many units. On at least one occasion, the Government project manager attempted to settled the dispute by removing the louver from a door installed by SKI. The louver had no caulk. Mr. Skip Kirchdorfer also had a louver removed on

at least one occasion and the louver was caulked. We conclude that SKI's supplier was inconsistent in caulking the louvers (tr. 2/48, 11/173-74; R4, tabs, 74, 92).

167. Throughout the contract, the parties were in dispute about the front entrance doors supplied by SKI. The doors had a window in them (referred to as a light). Some of the units required a door that opened from the left and some of the units required a door that opened from the right. SKI ordered all of its doors to open from the left. Therefore, when the left swinging doors were installed in united needing a right handed door, the screws that secured the door light in place were exposed to the outside. The Government considered this to be a security problem. The defect appeared on the punchlists for many of the units. SKI's proposed solution to

the problem of caulking over the screw heads was rejected by the Government as a maintenance problem for when any maintenance needed to be performed on the lights, the screws would not be visible. SKI never corrected the problem. After the termination, the Government removed the lights and reversed the installation, a solution which SKI had refused to do because it alleged that the lights were embedded in caulk and could not be removed (tr. 7/155-56, 11/209, 214-15; SR4, tab 98 report 14; R4, tabs 78, 82, 92).

ALUMINUM WINDOWS

168. Section 08520 of the specification states:

> 4. SHOP DRAWINGS:
>
> Shop drawings of windows and screens shall be submitted to the Contracting Officer for approval. Shop drawings shall indicate location and elevation

> of each type and size of window and shall show full size sections, thickness and gages of metal, fastenings, proposed method of installation and anchoring, the size and spacing of anchors, . . . [s]hop drawings shall also show details of the connections between new windows and the various interior building finishes adjoining the windows.
>
> 12. INSTALLATION:
>
> . . . Window frames or closures shall be securely anchored to the supporting construction, in accordance with approved shop drawings and installation instructions. . . . After installation, the perimeter of all windows shall be sealed watertight with sealant as specified in Section 07920, "Caulking and Sealants."

(R4, tab 5)

169. The shop drawings submitted by SKI for the aluminum windows, and approved by the Government, called for 3 fasteners at the head of each window ("2 per head 6" from end and one centered") and 4 fasteners at each jamb[14] (tr. 9/30-31; exh. G-1).

170. Throughout the contract the Government noted that SKI was not installing the windows in this manner and SKI disputed that these fasteners were required and refused to install the windows in this manner. This defect was noted on many of the punchlists for the units (tr. 11/89-92; exh. G-1; R4, tabs 74, 78, 82, 92; SR4, tab 120).

171. While the insufficient number of window fasteners was mentioned at almost every inspection, on 4 September 1985, Mr. McDonald told the Government that SKI would not correct the problem because SKI believed the number of window fasteners were sufficient and in accordance with the shop drawings. SKI never installed the proper number of window fasteners (SR4, tab 97 report 30; tr. 11/209-10, 13/218-20).

DOOR THRESHOLDS

172. Section 8705 of the specification states:

> 10. MISCELLANEOUS ITEMS FOR DOORS:
>
> a. Door Shoes and Thresholds. New metal door shoes and thresholds shall be installed at new exterior doors. . . . [a] bead of caulking compound shall be applied on the interior of the outer flange and at each end of each door shoe before installation of shoe, to seal the shoe watertight. Thresholds shall be cut to fit jambs and set in a bead of caulking compound.

(R4, tab 5)

173. On 25 July 1985, a Government inspector told SKI that it was not caulking the length of the thresholds. Mr. McDonald denied that caulking was required but pointed out that in any event there was a vinyl strip on the thresholds that took the place of caulk. The Government approved of the use of the vinyl strip as long as the manufacturer approved it in its literature. There was

a second caulking problem, however. The Government also states that the ends of the thresholds were not being caulked. SKI contends that while it did not caulk the ends of the thresholds prior to inspections, that it did so during the inspections (app. requested finding of fact 791) (SR4, tab 96 report 24; tr. 11/196-98).

174. By 5 August 1985, SKI had not provided the Government with a copy of the manufacturer's literature on the vinyl strip and the Government requested it again (SR4, tab 97 report 2).

175. On 12 August 1985, at the inspection of 102 Palm, the Government stated that caulk needed to be applied under the threshold. The lack of caulk at the door thresholds was noted on many of the units' punchlists (SR4, tab 97 report 8; R4, tabs 74, 92).

SHOWER ENCLOSURES

176. Section 10800 of the specification, Bathroom Accessories, states:

> 5. INSTALLATION
>
> . . . [a] continuous bead of waterproof sealant, of type recommended by the enclosure and door manufacturer, shall be applied to existing jambs and still prior to installation of metal frames. Excess sealant which is exposed after frames are installed shall be removed.

(R4, tab 5)

177. On 23 July 1985, it was discovered that the original shower enclosures delivered to the job site were the wrong size and had to be returned (tr. 11/2000, 13/210-11; SR4, tab 96 reports 22-23).

178. On 19 August 1985, Mr. McDonald informed the Government that the replacement shower enclosures had been

shipped but had been lost en route (SR4, tab 97 reports 15-16).

179. The shower manufacturer's instructions required SKI to install a neoprene gasket on the vertical flange of the panel and door section of the shower enclosure. SKI did not do this and many of the shower enclosures leaked, despite the fact that SKI did caulk them. The improper installation of the shower enclosure was noted on many of the units' punchlists (R4, tabs 82, 92; tr. 11/201, 12/21-22, 14/280-81).

180. During the contract, Mr. McDonald contended that the neoprene seals were not required and were not available. After the termination, the Government inspectors found the neoprene seals along with the manufacturer's instructions on installing them in SKI's warehouse (tr. 13/211-13, 14/65).

WINDOW SHADE CORDS

181. Section 12510 of the specifications, Shades and Traverse Rods, states:

> 6. MATERIALS:
>
> a. Window Shades . . . . Shades shall be furnished complete with roller, cords, brackets, screws and all accessories required for a complete installation.

(R4, tab 5)

182. The parties request us to find many facts regarding the dispute over pull cords on the shades but we find it unnecessary to go through the many submittals, removal and return of the shades and the improper cutting of shade lengths. The fact is that the shades that SKI supplied did not have pull cords, the Government noted the fact on the punchlists, SKI did not install them, the specifications required them, and the

Government never waived the requirement (tr. 11/86-87, 149-51, 187-88, 209, 13/210, 220-21; SR4, tab 98 report 14; R4, tabs 78, 82, 92).

RANGE HOODS

183. Section 16050 of the specification states:

> 6. KITCHEN RANGE HOODS:
>
> A new range hood shall be provided in the kitchen in all housing units included in this contract . . .

(R4, tab 5)

184. On 19 July 1985, Mr. McDonald reported to the Government that the range hoods received for the Palm Circle units were the wrong size and would have to be returned (SR4, tab 96 report 19).

185. On 28 August 1985, Mr. McDonald reported that the range hoods received for Palm Circle were too big to be installed. This shipment also had to

be returned. A third shipment of range hoods was the correct size but SKI never installed them, despite their absence being noted on many of the units' punchlists (SR4, tab 97 reports 23-24; tr. 11/82-84; R4, tabs 74, 78, SR4, tab 120).

CONTENTIONS OF THE PARTIES

ASBCA No. 32637 - Termination for Default

SKI advances seven theories upon which it requests that the Board overturn the termination for default:

1. That the contracting officer had inaccurate facts when rendering his decision and therefore the decision was defective.

2. That the contracting officer did not exercise his independent judgement in rendering his decision.

3. That the Government's alleged failure to provide direction to SKI justifies SKI's failure to perform.

4. The termination was procedurally defective.

5. The contract could not be terminated for "late delivery."

6. The termination was made in bad faith.

7. The alleged deficiencies in SKI's work were not a valid basis for the default termination.

The Government's position is that SKI's work was generally deficient and that when notified of its deficiencies, SKI refused to correct them. The Government denies any over inspection or failure to cooperate, and alleges that SKI simply failed to prosecute the contract work in a manner that would result in completion of the contract by

refusing to perform proper quality control, refusing to correct work, and by stopping work. The Government denies the contracting officer's decision to terminate was improper in any respect.

ASBCA No.35074 - Delay Claim

SKI's position is that the Government delayed it between 1 November 1984 and 1 July 1985 and 7 August 1985 and 30 December 1985 (388 days) by an incorrect interpretation of SP-14, by proposing modifications, by refusing to allow SKI to begin work on 25 March 1985, by suspending progress payments, and by wrongfully interpreting what "on hand and ready for use" meant.

The Government argues that it correctly interpreted SP-14 and that the delay resulted from SKI's own failure to accept the Government's direction to

begin work on Palm Circle and to plan and manage the work.

DECISION

PRELIMINARY MATTERS

The pre-trial phase of these appeals could hardly have been more contentious. There were approximately 60 pre-trial motions filed by the parties. We deal below with the two motions which we deferred ruling on until the decision on the merits, and also with a post-trial motion.[15]

APPELLANT'S MOTIONS FOR SUMMARY JUDGEMENT

On 21 February 1989 and 1 March 1989, shortly before the scheduled hearing of these appeals, SKI filed motions for summary judgement as to the termination for default (ASBCA No. 32637) and for 120 of the 388 day delay claim in ASBCA No. 35074. Because there was insufficient time prior to the scheduled

hearing date to allow the Government to respond and the Board to issue decisions, and because the hearing had been continued a number of times, the Board deferred ruling on the motions until this decision. A discussion of the motions would be a waste of resources. Suffice it to say that summary judgement is not a proper vehicle to dispose of these appeals. Of the 1,077 requested findings of fact in SKI's main post-trial brief, 996 are designated by SKI as "disputed." The motions are denied.

APPELLANT'S MOTION TO STRIKE

During the hearing, one of the Government's witness, on cross examination, gave an inconsistent answer to a question from the answer he gave in his deposition. The witness explained that a possible reason his deposition answer was inconsistent with his

testimony was that at times during the deposition he was not permitted to look at his daily reports. He did not know if this was one of these instances. Counsel for appellant represented that he never refused the witness the opportunity to look at his daily reports during the entire deposition. Government counsel was given leave to file those pages of the deposition in which the Government contended that such did occur (tr. 13/12-25). The Government filed three pages. Appellant then moved to strike the pages filed by the Government as non-responsive because they dealt with appellant's counsel's instructions to the witness at the deposition not to look at documents other than his daily reports. Appellant's counsel is correct and we consider it established that the witness was not denied access to his daily

reports during the deposition. There is no need, however, to strike the Government's filing and the motion is denied.

TERMINATION FOR DEFAULT - NO. 32637

We start with the well known proposition that a termination for default is regarded as a claim by the Government and as such the burden is upon the Government to prove that circumstances existed that permitted it to terminate the contract for default. In this case, where the contract was terminated for failure to make progress, the Government has the burden of proving:

> ...that at the time of termination action the contracting officer had a reasonable, valid basis for concluding, on the basis of the entire record, that there was no reasonable likelihood that appellant could perform the entire contract effort within the time remaining for contract performance.

RFI Shield-Room, ASBCA Nos. 17374, 17991, 77-2 BCA Par. 12,714 at 61,735; see also, Lisbon Contractors, Inc. v. U.S., 828 F.2d 759 (Fed. Cir. 1987).

As is developed in the course of the following discussion, we hold that the Government has met its burden of proving that there was no reasonable likelihood that the contractor could perform the entire contract within the time remaining for contract performance and we have found no excuse for such lack of performance. We turn now to an examination of each of the reasons SKI alleges should cause us to convert the termination for default to a termination for convenience of the Government.

SKI's first ground for arguing that the termination for default was not valid is its contention that the contracting officer did not have complete and

accurate facts in reaching his decision to terminate. We start our analysis by observing that the TCO was supplied with a large amount of information by the PCO and his associates (e.g., R4, tab 90). SKI makes much of the fact that the TCO did not personally visit the site. We know of no requirement that a TCO visit a site and are convinced that the TCO was supplied with ample information upon which to base his decision. SKI was afforded an opportunity to present whatever information it wanted to the TCO and took advantage of that opportunity to a limited extent.

SKI relies heavily on its allegation that the TCO was not advised that SKI was making an "active effort" to cure the defects and therefore a termination for default was not proper.[16] Cervetto Building Maintenance Co. v. U.S., 2 Cl.

Ct. 299(1983). Quite aside from the obvious question of why SKI did not advise the TCO of the particulars of its "active efforts" to cure the defects, the record reflects quite a different story. By the time the PCO referred the contract to the TCO for default consideration, SKI had failed to request any inspections for over a month, performed virtually no work for over a month, laid off most of its employees over a month beforehand, told the Government it was removing its warehouse and demobilizing, and removed equipment and material from the worksite. How this translates into an "active effort" to cure defects escapes us.

SKI's attack on the information supplied to the TCO as faulty or inaccurate consists of discussions of inconsequential matters or merely facts and opinions with which SKI has a

different viewpoint than the Government. We have found no attempt to mislead the TCO nor any defect in the TCO's factual considerations that would justify overturning the termination for default.

SKI's second argument for overturning the termination for default is its contention that the TCO did not exercise his independent discretion in making the termination decision. Schlesinger v. U.S., 182 Ct. Cl. 571, 590 F.2d 702 (1968). We have nothing in this appeal that even hints of a Schlesinger situation. Our observation of the TCO at the hearing and consideration of his testimony convinces us that he independently considered all the pertinent facts and circumstances in arriving at his decision. A careful reading of SKI's argument in its brief reveals that it merely disagrees with the

conclusions reached by the TCO, not that someone else dictated those conclusions. Both the TCO and the PCO have a right, especially in technical areas, to seek (and follow if they are persuaded) the advice of their associates. Kit-Pack Company, Inc., ASBCA No. 33135, 89-3 BCA Par. 22,151; Max Jordan Baunternehmung, ASBCA No. 23055, 82-1 BCA Par 15,685; aff'd 10 Cl. Ct. 672 (1986). We perceive that the PCO and TCO did nothing unusual in this regard.

SKI's third basis for requesting that we overturn the termination for default is the alleged failure of the Government to provide SKI with clarification and direction, breaching its implied obligation not to interfere with the contractor's performance of the contract. Nanofast, Inc., ASBCA No. 12545, 69-1 BCA Par. 7566; Pacific

Devices, Inc., ASBCA No. 19379, 76-2 BCA Par. 12,179. We find SKI's protestations that the Government would not tell it how to correct the defects to be disingenuous.[17] The truth is, in most instances, Mr. McDonald did not agree with the Government's interpretation of what were defects and stated that SKI would not correct them. For example, nothing was required from the Government to allow SKI to submit evidence (as the contract required) that the doors complied with the specifications, and the Government had no obligation to develop an installation method for edge metal that would prevent "kickout." One of the reasons SKI was hired, was to exercise its construction expertise. Likewise, when the Government identified sagging soffits as a defect, it remained to SKI to install them without the sage, not for

the Government to direct SKI exactly how to fix the problem. As to expansion joints, SKI never submitted a proposed sealer and it was up to SKI to remedy the door lights that had screws on the wrong side. SKI merely had to follow its own shop drawings to determine where to place the screws in the window heads and it is incredible that SKI could not determine how to put pull cords on the window shades. All in all, it is clear to us that SKI did not, or could not, exercise the construction expertise it had been hired to exercise and instead wanted the Government to direct its every move. We reject SKI's contention that it did not understand what the defects were. The credible testimony was clear that the inspectors pointed out the defects to SKI personnel during the inspections, discussed the defects with them, and (in

all but one instance) provided a written record to SKI. SKI's correspondence (see particularly 2 October 1985 letter) demonstrates that SKI had a clear understanding of the defects but merely disagreed in many instances that the work was required. To the contrary, records concerning SKI's quality control inspections, acceptance inspections, or directions to its personnel to correct defects are almost non-existent. This problem was exacerbated by SKI' practice of requesting inspections by the Government when units were indisputably unfinished and, as near as we can determine, the absence of any organized quality control effort. As we observed in a similar situation, when a renovation contractor began t request inspections on units that were far from being even arguably completed:

[t]he Government must have come face-to-face with the realization at that point that [the contractor's] concept of what satisfactory performance was bore no relation to the specifications. The only credible explanations for [the contractor] offering units it knew to be incomplete are that it was trying to have the Government accept units not meeting contract requirements or it wanted the Government to perform the contractor's quality control function. LaCoste Builders, Inc., ASBCA Nos. 29884, 29957, 29966, 30085, 88-1 BCA Par. 20,360 at 102,890.

SKI's fourth reason for overturning the termination is that it was procedurally defective because the Government failed to give it proper direction on how to replace defective materials (see Inspection and Acceptance,

DAR 7-602.11 (1976 OCT) and Termination for Default-Damages for Delay-Time Extension, DAR 7-602.5 (1969AUG). We have found that the Government did not fail to properly clarify matters to SKI, so we reject this argument. SKI also contends pursuant to Raytheon Service Co., ASBCA No. 14746, 70-2 BCA Par. 8390, that the time period between the default and the actual termination was too long and that SKI continued to try and perform in the interim so that any delivery requirement was waived.[18] Factually, this assertion is incorrect. We found that after 17 September 1985, SKI all but abandoned the contract and there was no real continued performance by SKI. Finally, SKI argues that the cure notice did not put it on notice as to what the defects it was supposed to cure were. Putting aside the fact that the default

clauses in this contract does not require a cure notice, one only has to read SKI's 2 October 1985 letter and the daily reports and correspondence in the record to see that SKI was fully aware of the areas in which the Government considered its performance defective. The defects were well known, as well as the Government's contention that SKI was failing to prosecute the work diligently towards completion in a timely manner. In any event, a contractor who has notice of the defects in its performance by prior letter and conversations independent of a cure notice, is not prejudiced by the failure of the cure notice to state all the defects. RFI, supra. At the time of the PCO's 17 September 1985 cure notice, it can be hardly argued that SKI was diligently prosecuting the work for it had advised

the PCO on 13 September 1985 that it was demobilizing the contract. The 17 September 1985 cure notice gave SKI 10 days to cure its failure to diligently prosecute performance of the contract. As we found, subsequent to 17 September 1985, virtually no work at all was performed on the contract.

The next reason offered by SKI for overturning the termination for default is that the TCO testified that he did not consider SKI's alleged failure to meet the 15 day completion requirement of SP-14 as a basis for terminating the contract. We fail to see how this requires the termination to be overturned. The TCO testified that he terminated the contract for SKI's failure to make progress, not failure to deliver, in that it was his determination that SKI would never finish the contract work (tr.

10/12). Regardless of how SP-14 is interpreted (that is, whether there was a valid 15-day requirement for completion of each occupied unit or not) the fact remains that SKI did not finish any unit during the entire contract and was not making substantial progress toward completing the entire contract within the time frame required.

The sixth argument presented by SKI is that the termination for default must be converted to a termination for convenience because the termination for default decision was made in bad faith. In support of this theory SKI lists 41 "facts" that it alleges establish the Government's bad faith (app. main br. at 222-226). These 41 items are a list of every complaint SKI had on the contract. We have reviewed them and none establish that the termination for default decision

was made in bad faith and do not present, as alleged by SKI, well nigh irrefragable proof that "...the Government at Eglin intended, from early in the Contract, to cause financial harm to SKI and to create a basis to ultimately obtain a default termination. Kalvar Corp. v. U.S., 211 Ct. Cl. 192, 543 F.2d 1298, cert. den. 434 U.S. 830 (1976)." (App. br. at 227).

This last basis upon which SKI urges us to overturn the termination for default is that the deficiencies in SKI's work did not justify a termination for default. We have found that SKI had no organized quality control program. We saw no evidence of it in the record and the units presented to the program We saw no evidence of it in the record and the units presented to the government bore the fruit of SKI's practice of relying on the government inspectors to

perform the quality control function. Further, we found that Mr. McDonald consistently refused to correct valid items cited on punchlists. SKI then virtually abandoned the contract. It is abundantly clear to us that the CO had ample evidence based on the record to conclude that SKI's work was less than satisfactory and that SKI was not intending to correct it and that the contract was in danger of never being completed.

ASBCA NO. 35074-THE DELAY CLAIM

SKI claims a total of 388 days of delay, comprised on the period 1 November 1984 to 1 July 1985 and 7 August 1985 to 30 December 1985. The primary focus of SKI's delay claim is the government's interpretation of SP-14 that allegedly prevented SKI from starting work in Area I on Oak Drive. It must be observed that

SP-14, even without its modification in P00001, is difficult to work with and could benefit from a redrafting effort. We need not, however, go into the fine workings of the provision to determine the issues before us. It is SKI's contention that SP-14(d) which states, "[t]he area where the contract work shall begin will be designated by the government", did not give the government the right to designate the unit upon which work was to begin, but only the area in which work was to begin in. Quite apart from whether this distinction has any practical effect (for the government could have designated Area III to begin in under SKI's interpretation and still SKI should not have been able to start in Area I where it desired) we must look at what actually happened in this contract. First, we note that we

have little credible evidence as to what SKI planned at any time in the contract as to the sequencing of units.

Particularly, there is nothing to show what sequence SKI relied on in preparing its bid. In fact, in view of SKI's lack of documentation, we would be hard pressed to find that they had any sequence in mind at any particular time. Assuming, arguendo that SKI did bid the contract assuming it would start in Area I at Oak Drive and that assumption by SKI was reasonable and in accordance with the contract, SKI proceeded on this course despite being advised at the pre-construction conference on 23 July 1984 that the government wanted work to begin on Palm Circle. On 2 November 1984, SKI tried to dissuade the contracting officer from requiring work to start on Palm Circle. Subsequently, on 16 November

1984, SKI again argued with the government over starting on Palm Circle. Then on 6 December 1984, the contracting officer ordered SKI in writing, to commence work on Palm Circle and provided a house by house scheduling for performance of the contract work. Instead of immediately complying with the order or contacting the contracting officer, SKI ignored the direction and continued to operate as if it could start work on Oak Drive. SKI again on 12 March 1985 refused to obey the government's direction to begin work at Palm Circle and incredibly, on 25 March 1985, SKI gave the government notice that SKI would begin work at 102 Oak. The contracting officer thereafter directed SKI to begin work at palm Circle several more times in the following months until finally, on 6 June 1985, SKI accepted the direction to

begin at Palm Circle (albeit without all the necessary materials).[19] Even if the contracting officer was in error under Sp-14 in directing SKI to start on Palm Circle, SKI was on notice of the direction and was required to comply with the direction and file a claim for any increased costs. SKI was not free to ignore the direction and proceed to prepare to start work on Oak Drive. To the extent that starting at Palm Circle did delay SKI, it was the fault of SKI for failing to obey the directions of the contracting officer and for failing to order the material necessary for Palm Circle early on in the contract.

The next cause of delay alleged by SKI is the fact that the government proposed to modify the contract. SKI states that "SKI was prepared to begin work in Area 1 on 1 Nov 84 and would have

done so but for failure of the government to identify the type of door for Door No. 2." (app. main br. at 243). There is no evidence to support the assertion that SKI was ready to begin work on 1 November 1984 and we reject the assertion. We note that SKI did not even begin to construct its warehouse until 8 November 1984 and as of 14 January 1985, still had virtually no material at Eglin.

Thirdly, SKI contends that the government unreasonably refused to allow SKI to begin work on 25 March 1985. The government refused to allow SKI to begin work because SKI insisted on working on Oak Drive, contrary to the direction of the contracting officer to begin work at Palm Circle. In any event, SKI did not have the material "on hand and ready for use" for either Oak Drive or Palm Circle on 25 March 1985. There was nothing

unreasonable in the contracting officer's actions in insisting that SKI comply with the government's directions.[20] This insistence by the contracting officer did not delay SKI from 25 March 1985 until 1 July 1985 as alleged. What delayed SKI was its continued refusal to follow the direction of the contracting officer.

Next, SKI alleges that the government's discontinuance of progress payments (actually delayed payment of the April and May 1985 invoices until July 1985) caused "greater delay than would otherwise have occurred." This argument is based on the allegation that having bought the material for Area I, SKI was not financially able to buy the Area II material. We have found that SKI did not prove this financial inability. In any event, the reason SKI bought all the Area I material without buying the Area II

material is that it refused to obey the directions of the government to commence on Palm Circle. SKI seeks to cure its failure to prove its lack of financial resources by requesting a negative inference from the failure of the government to introduce evidence that SKI did have the financial resources. SKI is not entitled to such an inference. In the absence of probative evidence produced by SKI that it did not have the financial resources, it was not incumbent on the government to present such proof. Additionally, as we found supra, SKI never ever calculated what the cost of the additional materials required to start on Palm Circle instead of Oak Drive was.

Finally, SKI argues that the government's interpretation of that portion of SP-14 that requires that no

work be performed on occupied housing units unless " . . . . all materials are on hand and ready for use," is incorrect. SKI states:

> SKI could have complied with the Contract and begun work in March 1985. At that time SKI had all materials on hand necessary: substantial amounts of materials were ordered and scheduled to be shipped in time to comply with the 15-day completion requirement; all other materials, including cement and gravel were obtainable from local sources.

(App. main br. at 248).

We hold SKI's interpretation of "on hand and ready for use" to be incorrect. While the government did permit a relaxation in that portion of SP-14 in July 1985, the fact still remains that prior to that time, material was required to be on hand and ready for use. How material can be ready to be used on occupied units when it is in another state or not even purchased yet escapes

us. SKI would have us find that the government should have relied on Mr. McDonald's statements that materials were in inventory or being shipped and allowed construction to commence. A ready of our findings reveals that reliance on Mr. McDonald's representations on the status of material would not have been prudent action by the government. We hold that the government acted correctly and reasonably in its interpretation of "on hand and ready for use."

CONCLUSION

The appeals are denied.

Dated: 13 September 1990.

MARK N. STEMPLER
Administrative Judge
Member of the Armed Services Board of Contract Appeals

I concur

WILLIAM J. RUBERRY
Administrative Judge

Acting Chairman,
Armed Services Board
of Contract Appeals

I concur

ALAN M. SPECTOR
Administrative Judge
Vice-Chairman, Armed
Services Board of
Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract appeals in ASBCA Nos. 32637 and 35074 Appeals of Skip Kirchdorfer, Inc., rendered in conformance with the Board's Charter.

Dated: 14 Sept 1990

EDWARD S. ADAMKEWICZ
Recorder, Armed
Services Board of
Contract Appeals

NOTES

1.The three week trial of this appeal generated approximately 4,000 pages of transcript and 400 lengthy exhibits. At the conclusion of the trial, the presiding judge advised counsel that due to the length of the record which contained a tremendous amount of extraneous and repetitive material which the parties insisted on including in the record, that the Board was not going to search the record to find support for

either party's position on any issue. Counsel were advised to write clear, concise, cogent, correctly cited, and well supported briefs and that if the support for any proposition was not cited in the brief, and that if the support for any proposition was not cited in the brief, the Board would assume no support exists in the record for the assertion. Counsel responded with approximately 1,000 pages of briefs.

2.Mr. Skip Kirchdorfer is the president of SKI. His son, Scott Kirchdorfer, worked for SKI (tr. 5/94).

3.For ease of reference, we have used the paragraph structure as it originally appeared in SP-14.

4.Skip Kirchdorfer testified that he normally visited the site about every 2 weeks (tr. 4/7). The government contests this fact and from the record we cannot find that Skip Kirchdorfer was present with such a frequency. Mr. McDonald, SKI's project manager, from our examination of the record, was the only SKI representative on-site with regular frequency.

5. We have no evidence whether the title was a local purchase item or not.

6.It is unclear why the louvers were disapproved since they were the louvers requested by the project engineer (tr. 2/45-46).

7.SKI contends that it changed roofing subcontractors because of poor quality work. The former roofing subcontractor alleged to the government that its subcontract with SKI called for SKI to supply the roofing material and that SKI was not supplying the material needed and that the subcontractor terminated the subcontractor in July 1985 (Sr4, tab 96 report 22; SR4, tab 123; tr. 2/196, 11/179).

8.Mr. Skip Kirchdorfer testified that none of SKI's delay claim was in any attributable to occupants not being home or fences not being removed by occupants (tr. 5/47).

9.We do not deal with every problem the parties had, but the ones that appear from the record to be of consequence. We also do not, as is true throughout this opinion, recite and/or discuss all the evidence presented by each party on every point. We considered all the evidence but deem it unnecessary to discuss the thousands of pieces of conflicting evidence since much of it lack probative value or strains credulity.

10.Mr. Skip Kirchdorfer took a video tape of some of SKI's exterior work on 13 January 1986. The quality of the film, lighting and camera work is such that we can make no findings from the exhibit (exh. A-128). In February 1986, a representative of the surety (accompanied by appellant's counsel) made a videotape of some of the buildings under the contract. While the tape is of a better quality and clearly shows some of the

defects, it generally, because of lighting and angles, cannot be relied on (exh. A-127; tr. 7/142).

11.SKI's expert, from its surety, Mr. Curry, also thought that sagging and warped soffits were caused by the thickness of the plywood used (exh. A-108 (E)).

12.The reprocurement contract would take a common crimping tool and crimp two section sof the metal edge together to eliminate the kickout problem (tr. 10/113-15).

13.SKI argues that a 15 January 1985 letter from its supplier to SKi that was attached to SKI's door submittal is a certification. It is not. The letter merely confirms to SKI that the supplier will produce (not did produce) the doors in accordance with the specifications (exh. A-27). SKI also argues that the stamps on the door with the manufacturer's name, the type of wood and a "solid door" label were sufficient to be a certification (exh. A-123; tr. 12/227. They are not. SKI also argues that the standard limited door warranty it attached to a 2 October 1985 letter to the government is a certification. The warranty makes no certification as to any of the specifications of the contract whatsoever (R4, tab 96).

14.SKI contends that the shop drawings do not require three fasteners on each head. We conclude that the government's interpretation of the supplier's shop drawings is correct. While SKI's

position that it should have been required only to fill the pre-drilled holes in the windows has some appeal, the drawings appear clear in their instructions and SKI failed to introduce any evidence from the supplier that the drawings should be interpreted in any other way.

15.It is not clear to the Board, but it appears that throughout appellant's reply brief, filed almost a year after the hearing, it makes a multitude of evidentiary objections. To the extent that the objections were raised at trial, they were ruled on and our rulings are hereby affirmed. To the extent that these objections were not raised at trial, they are waived.

16.We point out here an aspect of SKI's brief that troubled us throughout our deliberations. That is, many of the citations and statements are non-existent, inaccurate and misleading. For instance, in this argument, SKI states:

* * *

> He [the TCO] further admitted that he automatically gave no credence to any representations from SKi and automatically presumed all representations of Eglin personnel to be accurate, complete and truthful.

* * *

> Because he [the TCO] regularly assumed contractors were dishonest

> and untruthful and government personnel were honest and truthful he did not make the reasonable investigation required of him as a matter of law.

(App. main post-hearing br. at 204).

The TCO did not testify in a manner that supports these assertions.

17.It is unclear how SKi squares this argument with its argument infra that it was not advised what the defects in its performance were.

18.This argument assumes that doctrine set forth in Raytheon applies to construction contracts. We have held that it does not. LaCoste Builders, Inc., ASBCA Nos. 29884, 29957, 29966, 30085, 8801 BCA paragraph 20,360 and cases cited therein.

19.We cannot determine from the record when all the material for Oak Drive was finally "on hand and ready for use" but we note that as late as 25 March 1985 SKI did not have the material for any unit under contract in their inventory.

20.While the government's reason for wanting construction to commence on Palm Circle does not appear to be substantial, the fact remains that it was the owner of the buildings and was entitled to direct SKi to proceed in any sequence it wanted, albeit at a higher cost if such direction was a change to the contract.